Office-Supreme Court, U.S.
FILED
APR 14 1966
JOHN F. DAVIS, CLERK

No. 1102

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

THE MONTREAL TRUST COMPANY, as Executor of the Estate of Isidor J. Klein, Deceased,
Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE MONTREAL TRUST COMPANY

HENRY HARFIELD
JOHN E. HOFFMAN, JR.
20 Exchange Place
New York, N. Y. 10005
Attorneys for Petitioner, The Montreal Trust Company

SHEARMAN & STERLING
Of Counsel

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 1102

THE MONTREAL TRUST COMPANY, as Executor of the Estate of Isidor J. Klein, Deceased,
Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE MONTREAL TRUST COMPANY

The issue between the parties is: does the proposed application of the New York "long-arm" statute render that statute unconstitutional?

1. The petition herein seeks determination of fundamental constitutional questions arising in the context of attempted extra-territorial, retroactive assertion of in personam jurisdiction over the non-resident alien executor of a non-resident alien decedent.

The respondent's memorandum in opposition attempts to evade the constitutional issues here presented by means of a brusque averment that this case involves only the application of New York agency law to a particular set of facts, claimed to be "reasonably inferable," (Resp. Memo. 3) though contrary to the findings of fact of the district court. Such characterization of this case is akin to portrayal of *International Shoe Co.* v. *Washington,* 326 U. S. 310, as a case involving the application of Washington's Unemployment Compensation Act to a squad of shoe salesmen. Constitutional questions—certainly those ripe for review by this Court—must always emerge from particular facts and legal relationships.

The international dimension of the claim of jurisdiction emphasizes the importance as well as the novelty of the issues presented to this Court. The "long-arm" is not here exercised within the framework of our federal system.[1] The attempt here is to reach beyond our borders to haul an alien executor across international boundaries it never thought to pass.[2]

The respondent's contention here that the decision of the court of appeals was essentially factual is consistent only with its persistence in pursuing discrepant theories of the issues to be decided—a tactic explicitly noted, and condemned, by the dissenting judge (Pet. 31-32, n. 4). Although respondent now opposes the petition by labeling

---

1. As in *Longines-Wittnauer* v. *Barnes & Reinecke,* 15 N.Y. 2d 443, *cert. den. sub nom. Estwing Manufacturing Co.* v. *Singer,* 382 U. S. 905, relied upon by respondent (Resp. Memo. 3) and by the majority of the court of appeals panel (Pet. 22-23).

2. Purported service of process on petitioner in New York was vacated. The district court observed that "process could not validly be served upon Montreal Trust Company in New York, even in an action against it in its individual capacity." (Petitioner's printed appendix in the court of appeals, A-4)

the determination of the court of appeals as "an evaluation of the particular facts of this case," (Resp. Memo. 2) respondent sought and obtained review by the court of appeals upon the express representation that this case "involves a controlling question of law as to which there is substantial ground for a difference of opinion." (See Pet. 5-6)

The respondent recognized the constitutional issues involved here when it cited to this Court one of the district court decisions in this very case (*United States* v. *Montreal Trust Co.*, 35 F.R.D. 216), in respondent's reply brief in *United States* v. *First National City Bank*, 379 U. S. 378 (Cf. Resp. Memo. 2, n. 1). The merits of the district court's decision were, of course, neither briefed nor argued before this Court in *First National City Bank*, as the jurisdictional questions raised by the decision of the district court were not then subject to review. Those issues are, however, now squarely presented by the petition. The respondent should not be heard to forestall such review of a jurisdictional decision, which it has previously relied upon before this Court, by the claim that the case involves only peculiar facts and agency law.

Further in its attempt to cast the decision of the court of appeals as a factual determination, respondent has asserted that "the dissenting judge agreed in large measure with the majority's resolution of the broad legal questions. * * *" (Resp. Memo. 2) Respondent fails to mention that such unanimity as existed below was contrary to the respondent's contentions, and represents a refutation by both majority and dissenter of propositions asserted by the respondent, both in the court of appeals and here. Examination of the majority and dissenting opinions below reveals that the schism in the panel was

on the precise constitutional question presented here for resolution—whether the New York "long-arm" statute has been rendered unconstitutional as applied.

2. Respondent has wholly misconstrued the second point of the petition. That point challenges the propriety of disturbing findings of fact of the district court on the basis of inferences and allegations.[3] Respondent's reference to *Land* v. *Dollar*, 330 U. S. 731, does not meet this point. *Land* v. *Dollar* was urged at great length by the respondent in the court of appeals, as it is here, for the proposition that this is "the type of case where the question of jurisdiction is dependent on the merits." (Resp. Memo. 4) Respondent ignores the fact that this particular contention was rejected not only by the dissenting judge (Pet. 31-35), but also by the majority of the court of appeals (Pet. 18) and by the respondent itself before the district court (see Pet. 31-32, n. 4).

In *Land* v. *Dollar*, proof of the allegations of the complaint would have established that the action was not one against the United States and therefore that jurisdiction could be assumed. In the case at bar, proof of the allegations of the complaint would establish only that Isidor J. Klein owed the United States Government some taxes. It would do nothing to establish that Klein's Canadian corporate executor, performing its fiduciary functions under control of the court in British Columbia, is subject to the personal jurisdiction of the United States District Court for the Southern District of New York.

3. The decision below provides no guidance for the state and federal courts which necessarily will look to it

---

3. At the same time, respondent concedes that the conclusion of the majority of the court of appeals rested on what to them "was reasonably inferable."

for such direction in determining the permissible scope and application of state "long-arm" statutes. As stated by the dissenter:

> "The decision by the majority * * * surely will come back to plague us and, until corrected, will be most unsettling to the bar and to the district courts in an area where we have recognized that certainty and predictability, based on reasonably clear-cut rules, is desirable. * * *"

There is immediate need for determination of the constitutional limitations on jurisdiction over non-resident aliens. The decision can be made only by this Court.

Respectfully submitted,

HENRY HARFIELD
JOHN E. HOFFMAN, JR.
Attorneys for Petitioner,
The Montreal Trust Company

SHEARMAN & STERLING
Of Counsel

April, 1966